Arul Balasingam v Ampang Puteri Specialist Hospital Sdn Bhd (formerly known as Puteri Specialist Hospital Sdn Bhd)

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO 24NCVC-1130–05 OF 2012
PRASAD ABRAHAM J
28 JUNE 2012

Civil Procedure — Interim order — Preservation of status quo — Consultant anaesthetist's practice in hospital terminated for alleged falsification of medical reports — Consultant applied to stay effect of termination pending arbitration — Whether consultant shown bona fide serious issues fit for arbitration — Whether justice of case favoured grant of stay — Whether consultant's professional integrity and reputation would be irreparably harmed if stay not granted

The plaintiff had been a consultant anaesthetist in the defendant hospital for 17 years when he was asked by the defendant to explain an incident where he was allegedly involved in two surgeries at one time and the blood tests apparently relied on were inaccurate. Despite the plaintiff formally explaining the incident, he was again questioned about the matter at a meeting of the Medical Advisory Committee ('MAC') following which he was given a letter of suspension. When the plaintiff consulted his peers in the MAC about the suspension they issued a letter to the defendant denying any conclusion had been reached at the meeting that the plaintiff had falsified any record, in particular, blood test reports. The plaintiff wrote to the defendant pointing out the irregularities in the MAC meeting but instead of getting a response to that issue, the plaintiff was asked to attend a Board of Management Committee ('BOMC') meeting where he was allegedly neither allowed to call witnesses nor be represented. Following the BOMC meeting, the plaintiff's Resident Consultant's Agreement ('RCA') with the defendant was terminated. He appealed against the termination, but the appeal was dismissed and a second termination notice was issued to him. Although the plaintiff had, prior to the termination, asked the defendant to refer the dispute between them to arbitration the defendant had not responded positively to that suggestion. The plaintiff applied to the High Court for an order to stay the effect of the notice of termination pending arbitration. He argued that (i) the second termination notice was invalid as there were no grounds in law or in fact to substantiate it (ii) there was evidence to suggest the MAC did not conclude he had falsified records (iii) there appeared to be a short-coming in the regime of blood tests kept by the defendant (iv) the defendant had breached the terms of the RCA and medical by-laws and (v) no proper inquiry or investigation into the

A incident was done by the defendant's Clinical Governance Committee as was required by the medical by-laws.

Held, allowing the application:

B (1) The plaintiff had presented to the court facts which disclosed bona fide serious issues to be tried which were justiciable by way of arbitration (see para 8).

(2) On balance, the justice of the case favoured the granting of the order sought. As far as the defendant was concerned it was just waiting for the C matter to be arbitrated. The plaintiff, on the other hand, had to move his clinic out of the hospital under a shroud of serious allegations touching upon the core of his professional integrity and competence as a specialist anaesthetist (see para 11).

D (3) No amount of damages subsequently awarded could remedy the irreparable damage to the plaintiff's reputation bearing in mind the lack of corroborative evidence on the part of the Medical Advisory Committee. The sole test for the court was whether the status quo should be preserved (see para 12).

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[Bahasa Malaysia summary

Plaintif merupakan konsultan anestetik di hospital defendan selama 17 tahun apabila dia diminta oleh defendan untuk menjelaskan satu insiden di mana dia dikatakan terlibat dengan dua pembedahan pada masa yang sama dan F keputusan ujian darah yang rupanya dipergantungkan adalah tidak tepat. Meskipun plaintif secara rasmi menjelaskan insiden tersebut, dia sekali lagi ditanyakan mengenai perkara tersebut pada satu mesyuarat Jawatankuasa Penasihat Perubatan ('JPP') dan selepas itu dia diberikan surat penggantungan. Apabila plaintif bertanyakan rakan-rakannya di JPP mengenai penggantungan G tersebut, mereka mengeluarkan sepucuk surat kepada defendan, menafikan sebarang kesimpulan yang dicapai di mesyuarat bahawa plaintif telah memalsukan mana-mana rekod, khususnya, laporan ujian darah. Plaintif menulis kepada defendan menyatakan mengenai ketidakaturan di mesyuarat JPP tetapi daripada menerima respon mengenai isu tersebut, plaintif H sebaliknya diminta untuk menghadiri mesyuarat Lembaga Jawatankuasa Pengurusan ('LJP') di mana dia dikatakan tidak dibenarkan untuk memanggil saksi-saksi atau diwakili. Selepas mesyuarat LJP, Perjanjian Perunding Residen ('PPR') plaintif dengan defendan dibatalkan. Dia merayu terhadap pembatalan, tetapi rayuan tersebut ditolak dan notis pembatalan kedua I dikeluarkan terhadapnya. Walaupun plaintif telah, sebelum pembatalan, meminta defendan untuk merujuk pertikaian antara mereka kepada timbang tara, defendan tidak memberi tindak balas positif kepada cadangan tersebut. Plaintif memohon kepada Mahkamah Tinggi untuk satu perintah untuk menggantungkan kesan notis pembatalan sementara menunggu timbang tara.

Dia menghujah bahawa (i) notis pembatalan kedua adalah tidak sah memandangkan tidak terdapat alasan dari segi undang-undang atau fakta untuk menyokongnya (ii) terdapat keterangan menunjukkan bahawa JPP tidak memutuskan bahawa dia memalsukan rekod-rekod (iii) terdapat kecacatan dalam rejim ujian darah yang disimpan oleh defendan (iv) defendan telah melanggar terma-terma PPR dan undang-undang kecil perubatan dan (v) tiada siasatan yang sepatutnya atau pemeriksaan ke atas insiden yang dijalankan oleh Jawatankuasa Tadbir Urus Klinikal seperti yang dikehendaki oleh undang-undang kecil perubatan.

Diputuskan, membenarkan permohonan:

(1) Plaintif telah mengemukakan kepada mahkamah fakta-fakta yang menyatakan isu-isu bona fide yang serius untuk dibicarakan dan harus diadili melalui timbang tara (lihat perenggan 8).

(2) Atas imbangan, keadilan kes berpihak kepada membenarkan perintah yang dipohon. Bagi pihak defendan, ia hanya perlu menunggu perkara tersebut ditimbang tara. Plaintif, sebaliknya, harus memindahkan kliniknya keluar daripada hospital, di bawah tuduhan serius yang menyentuh integriti dan kecekapan profesional beliau sebagai pakar anestetik (lihat perenggan 11).

(3) Tiada ganti rugi yang diawardkan dapat mengembalikan reputasi plaintif yang tercalar berdasarkan kekurangan bukti sokongan daripada pihak Jawatankuasa Penasihat Perubatan. Mahkamah harus memutuskan satu perkara sama ada status quo perlu dikekalkan (lihat perenggan 12).]

Notes

For cases on interim order in general, see 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 4022–4026.

Cases referred to

Fiona Trust & Holding Corporation & Others v Privalov & Others [2007] UKHL 40, HL (refd)

Rimbunan Hijau Sdn Bhd v Sarawak Playwood (M) Sdn Bhd [1985] 2 MLJ 377, SC (refd)

Thye Hin Enterprises Sdn Bhd v Daimlerchrysler Malaysia Sdn Bhd [2005] 1 MLJ 293, CA (refd)

Legislation referred to

Arbitration Act 1952

Arbitration Act 2005 ss 18, 18(1), 19

Darryl Goon (M Vinoben with him) (Raja Darryl & Loh) for the plaintiff.

M Yonoesswary Singam (Jagjit Kaur Gill with him) (Zainal Abidin & Co) for the defendant.

Prasad Abraham J:

[1] Originally the court was scheduled to hear encl 3, however both counsel before me agreed that as the issues and facts were essentially the same it would be more prudent to deal with encl 1 and with the consent of counsel the court so proceeded. I granted an order in terms of encl 1 (as amended) and the defendant have appealed against my decision and my grounds of judgment now follow.

FACTUAL MATRIX OF THE CASE

[2] These facts are found essentially in encl 2, the affidavit of the plaintiff in support of encl 1. In 1995 pursuant to a consultant agreement dated 28 March 1995, the plaintiff joined the defendant which had just opened its hospital. The plaintiff was a consultant anesthetist and had impressive credentials in terms of work experience before the plaintiff joined the defendant and subsequently the plaintiff signed a resident consultant's agreement (AB2 encl 2) which governed the relationship between the parties (see para 8 encl 2) the plaintiff also during his seventeen years tenure with the defendant, carried out duties and took on responsibilities that was testament to the defendant's confidence in the plaintiff's work (see paras 9–10 encl 2).

[3] On the 31 January 2012 the plaintiff was handed a letter from the deputy medical director of the defendant 'Dato Wahab' seeking an explanation of 'alleged unusual procedure' in the operating theatres and the plaintiff replied on the 3 February 2012 explaining what had transpired. It was alleged the plaintiff was covering two operations at one time and the blood tests apparently relied on was not accurate (see AB4–AB5 encl 2). The plaintiff again wrote to the said Dato' Wahab on the 16 February 2012, on the matter (see AB6 encl 2).

[4] Now on the same date, ie 16 february 2012 in a medical advisory committee meeting convened to discuss various issues the plaintiff's matter was brought up in the presence of the plaintiff. The plaintiff contends no notice of the same was given to him of this and the said Dato' Wahab proceeded to question the plaintiff on the allegations against plaintiff, but the plaintiff maintained his stand as per his letters to Dato' Wahab.

[5] Then on the 8 March 2012 the plaintiff was handed by the defendant's general manager a letter of suspension (AB7 encl 2). What is important to note from this letter the findings are premised on the due deliberation of the Medical Advisory Committee and the complaints seem now focused on the inaccuracies/and or falsification of the blood reports. The relevant provisions of the resident consultant agreement (AB2) were referred to. The plaintiff

obviously irked by this notice consulted his peers who were on the Medical Advisory Committee and who were present on the 16 February 2012 and they on the 10 March 2012 issued a letter to the defendant denying any conclusion of falsification of documents on the plaintiff's part (see AB10 encl 2). There also appears to be an issue as to the authencity of draft minutes of this meeting.

[6] The plaintiff wrote to the defendant on the 14 March, pointing out the irregularities in the meeting of the Medical Advisory Committee (see AB13 encl 2). There was no direct response to the plaintiff's said letter but the defendant on the 15 March 2012 wrote the plaintiff to attend a Board of Management Committee meeting on the 19 March 2012 (see AB14 encl 2). The plaintiff was given the option to call internal witnesses if thought fit. As the plaintiff thought that it was too short notice, the plaintiff wrote to the defendant on the 16 March (AB15 encl 2) which also raised the plaintiff's challenge to the procedure being adopted by the defendant. The defendant did not specifically reply to the plaintiff's letter but by the defendant's letter dated 19 March 2012 the Board of Management Committee meeting was to be held on 26 March 2012 at 3pm (AB16 encl 2) but in the meanwhile the Medical Advisory Committee had recommended to management that the plaintiff be suspended for two weeks, a position being challenged by the plaintiff.

[7] The Board of Management Committee met on the 26 March 2012. The plaintiff alleges that he was not allowed to call witnesses nor was the plaintiff allowed representation. On the 5 April 2012 the plaintiff was handed a letter of termination (AB18, encl 2). The plaintiff had written to the defendant to have the matter referred to arbitration. The plaintiff also appealed to the Board of Directors vide letter dated 7 April 2002 (AB19, encl 2). The defendant replied that a committee of review would be set up to consider the plaintiff's appeal (see AB20 encl 2). The Committee of Review heard the plaintiff's appeal and on the 4 May 2012, the plaintiff was handed a letter rejecting the plaintiff's appeal and a fresh notice of termination (second notice) issued (see AB14 encl 2).

SERIOUS ISSUES TO BE TRIED

The plaintiff argues

(a) The second notice of termination issued by the defendant to plaintiff is invalid as there were no grounds in law and/or in fact to substantiate the termination. There is evidence to suggest that members of the Medical Advisory Committee did not conclude there was falsification of the records by the plaintiff. Further, the plaintiff's explanations seem to point to a short coming in the regime of blood tests being kept at the defendant's hospital which apparently went online after the incident. Surely all these facts would have to be investigated and evaluated fully

before a finding could be reached as to whether the plaintiff was in breach of the resident's consultant agreement and medical by-laws;

(b) the plaintiff also raised specific breaches of the resident consultant agreement (AB2), and the medical by-laws; and

(c) there were no proper inquiry or investigation by the defendant's Hospital Clinical Governance Committee as required by the medical by-laws.

[8] I am satisfied the plaintiff have presented facts before me that disclose bona fide serious issues to be tried without going into the merits of the same. The serious issues are justicable by way of arbitration. The defendant submit that cl 10 of the resident committee resident consultant agreement is exhaustive and preclude in this case, reference to arbitration. Counsel for the defendant argues the relevant clause for termination is cl 10.2, which I now set out (AB2 p 21 encl 2):

> 10.2 Termination by the Company The Company shall have the right to terminate this Agreement by giving notice in writing of fourteen (14) days upon the happening of any one or more of the following events.

Upon notice being issued the only other relevant clause is cl 10.2.2.5 which I now set out:

> The Consultant shall have failed to carry out or commit a breach of any of the terms and conditions herein obtained. Then the Company, in consultation with Credentials Committee set up under the Medical Staff By-Laws, may (but shall not be obliged to) accept by way of compensation a sum of not more than Ringgit Malaysia Ten Thousand (RM10,000.00). Only as agreed liquidated damages for the waiver of such branch of the terms and conditions of this Agreement but he acceptance of such payment shall not operate as a waiver for any subsequent braches.

[9] So s 19 of the said agreement does not apply as both parties have to be bound by the agreement that they have put pen to. At this stage without making any specific finding on this argument all these are matters that the proposed arbitrator can deal with at the appropriate time s 18 of the Arbitration Act 2005 which I now set out particularly s 18(1).

> 18. Competence of arbitral tribunal to rule on its jurisdiction (1) the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.

Clearly provides for this. I refer to the commentary on the *Arbitration Act 2005 UNCITRAL Model Law* as applied in Malaysia Sundra Rajoo WSW Davidson p 84 to p 88 and I quote from the learned authors in paras 18.6–18.7:

18.6 Section 18(1) provides for the doctrine of 'Kampetenz-Kompetenz' which is taken from German terminology. The doctrine has two aspects. Firstly, it confirms to the arbitrators that they may decide on their jurisdiction without need for support from the court. Secondly, it discourages the court from determining the issue before the arbitral tribunal has decided it. The court itself when seized prematurely with the issue of the arbitrator's jurisdiction would confine itself to find that an arbitration agreement exists and ability of one party to delay the proceedings by taking the matter to court and claiming want of jurisdiction (see Malhotra, p 630).

Choices when challenged

18.7 Whenever there is a jurisdictional challenge, an arbitrator who can decide on his own jurisdiction has three alternative courses of action. First, he may determine that he has no jurisdiction at all particularly, where the lack of jurisdiction is evident, in which event the arbitral proceedings will terminate in the absence of a court order to the contrary. Secondly, he may determine that he has jurisdiction and issue an interim award, in which event either party or both parties may challenge the award in the manner provided for under the relevant legislation or rules and seek a pronouncement from a competent court or authority as to the jurisdictional issue. Finally, he may continue with the arbitration without adopting either of the courses above until stopped by an order from a competent court.

I concluded therefore the matter should be referred to arbitration.

[10] I also refer to the decision of the House of Lords in *Fiona Trust & Holding Corporation & Others v Privalov & Others reported in* [2007] UKHL p 40 where the House of Lords held:

(1) The time had come for a fresh start to be made to the construction of arbitration clauses. Such construction should start from the assumption that the parties, as rational businessmen, were likely to have intended any dispute arising out of the relationship into which they had entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with that presumption unless the language made it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. Clause 41 of Shelltime 4 contained nothing to exclude disputes about the validity of the contract, whether on the grounds that it was procured by fraud, bribery, misrepresentation or anything else. Accordingly it was apt to cover the question of whether the contract was procured by bribery (see [13]–[15], [21], [22], [31], [36], [37], [38], below); *AT & T Technologies Inc v Communications Workers of America* [1986] 475 US 643, *Threlkeld & Co Inc v Metallgesellschaft Ltd (London)* [1991] 923 F 2d 245 and *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192 considered.

(2) Section 7 of the 1996 Act was to be interpreted so that the main agreement and the arbitration agreement had to be treated as having been separately

concluded and the arbitration agreement could be invalidated only on a ground which related to the arbitration agreement and was not merely a consequence of the invalidity of the main agreement. The doctrine of separability required direct impeachment of the arbitration agreement before it could be set aside. In the instant case there was an inference that the agent acting for the owners had been bribed to consent to the main agreement, but that did not show that he had been bribed to enter into the arbitration agreement. Accordingly the arbitration agreement had to be given effect and the charterers were entitled to a stay of proceedings. The appeal would be therefore be dismissed (see [16]–[19], [21], [22], [32], [35], [36], [37], [38], below); *Prima Paint Corp v Flood & Conklin Mfg Co* [1967] 388 US 395 considered.

and see also:

(13) In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. As Longmore LJ remarked, at [17]: '[i]f any businessman did want to exclude disputes about the validity of a contract, it would be comparatively easy to say so.'

(14) This appears to be the approach adopted in Germany: see Schlosser 'The Decision of 27 February 1970 of the Federal Supreme Court of the Federal Republic of Germany (Bundesgerichtshof)' Arbitration Int 1990, 6(1) p 79:

> There is every reason to presume that reasonable parties will wish to have the relationships created by their contract and the claims arising there from, irrespective of whether their contract is effective or not, decided by the same tribunal and not by two different tribunals.

(15) If one adopts this approach, the language of cl 41 of Shelltime 4 contains nothing to exclude disputes about the validity of the contract, whether on the grounds that it was procured by fraud, bribery, misrepresentation or anything else. In my opinion it therefore applies to the present dispute.

[11] I now turn to the justice of the case and whether that on of granting the order sought out weighs against the harm of refusing the same. The order sought merely stays the effect of the notice of termination dated 4 May 2012 pending arbitration. As far as the defendant is concerned it is just awaiting for the matter to be arbitrated. The plaintiff on the other hand is being required to move his clinic out of the hospital under a shroud of serious allegations that are touching upon the core of his professional integrity and competence as a specialist anesthetist and the first with the defendant.

[12] In my view no amount of damages to be subsequently awarded, can remedy the irreparable damage to the reputation of the plaintiff bearing in mind the lack of corroborative evidence on the part of the Medical Advisory Committee. The sole test for the court is status quo and I refer to the decision of the Supreme Court in *Rimbunan Hijau Sdn Bhd v Sarawak Playwood (M) Sdn Bhd* reported in [1985] 2 MLJ 377 where it was held:

> The main consideration is whether the status quo ought to be preserved and in considering this the court must determine the matter on the balance of convenience.

This was a case involving the 1952 Arbitration Act and an injunction was being sought.

[13] I refer to the decision of the Court of Appeal in *Thye Hin Enterprises Sdn Bhd v Daimlerchrysler Malaysia Sdn Bhd* [2004] 3 MLJ 591 and to the judgment of His Lordship Mohd Ghazali Yusoff JCA at p 599 and I quote:

> It would seem that the KLRCA rules recognise the need for court intervention in certain situations, particularly in emergency cases, and have made suitable provisions in this connection. Court intervention, by way of ordering interim measures of protection, is essential in urgent situations particularly when granting relief is beyond the jurisdiction of the arbitral tribunal *or where the arbitral tribunal has not yet been constituted.* The court in *Third Chandris Shipping Corp v Unimarine SA* [1979] QB 645 observed that it only takes a telephone call or telex message which could, within seconds of the service of the writ, put all liquid assets out of reach of the creditor. The object of interim measures of protection is to support the arbitration by making it effective. This is to say, the court may intervene in support of arbitration by granting interlocutory injunctions. In this connection, in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] 1 All ER 664, speaking for the House of Lords, Lord Mustill candidly stated that 'none of the terms of the Arbitration Act of 1950, apply to foreign arbitrations and that since these include s 12(6), the power conferred by s 12(6)(h) to grant an interim injunction is not available to the court in respect of foreign arbitrations such as the present'. He then authoritatively stated the law: '… the purpose of interim measures of protection … is not to encroach on the procedural powers of the arbitrators but to reinforce them, and to render more effective the decision at which the arbitrators will ultimately arrive on the substance of the dispute. Provided that this and no more is what such measures aim to do, there is nothing in them contrary to the spirit of international arbitration.' Their Lordships then upheld the proposition that interlocutory measures could be taken against a defendant within the jurisdiction of the English courts to protect the foreign arbitration.

[14] For the aforesaid reasons I allowed the plaintiff's application in encl 1 on terms.

A *Application allowed.*

Reported by Ashok Kumar

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